course of an underground stream was marked by shrubs and bushes, which would grow nowhere except above such waters, it was held that the channel was well defined and that a lower riparian proprietor had a right to the flow of the water. It is not enough, however, that the presence of underground water in a given locality is ascertainable without excavation. In a recent case, *Katz* v. *Walkinshaw* (Cal. 1902) 71 Pac. 663, it was decided that the water in an artesian belt including several square miles of territory marked by shrubs and bushes was percolating water, since, "if there is any flow to this underground body of water thus held by pressure, it is by percolation."

PREFERRED DEBTS IN RAILWAY FORECLOSURES.—In *Fosdick* v. *Schall* (1878) 99 U. S. 235, the Supreme Court announced a rather startling doctrine as to preference of certain debts upon foreclosure of any railway mortgage. Holding that a claim for car rental was to be paid out of the assets in the hands of the receiver before satisfying the claims of bondholders, who had filed a bill to foreclose a mortgage upon a certain railway, WAITE, C. J., for the Court, announced that the public interests inhering in the operation of railways demand that unsecured debts for labor, equipment and supplies be protected. The parties to the usual railway mortgage, said he, recognize this, and impliedly agree that the road's current earnings during a given period be applied first to its current debts; hence, whenever this current fund is devoted to any other object, such diversion, as against the holders of these claims, is unlawful; and so, when the mortgagee seeks the aid of equity in foreclosure of his lien, he must do equity, and postpone his lien to these debts. The Court then proceeded to apply this doctrine to a debt for car springs sold to the railway just prior to the receivership, *Hale* v. *Frost* (1878) 99 U. S. 398, and to a debt for labor. *Union Trust Co.* v. *Ill. Midland Co.* (1886) 117 U. S. 434. The assignees of such claims, the Court has held, are also entitled to such preferment. *Burnham* v. *Bowen* (1884) 111 U. S. 776. The doctrine has been reaffirmed in two comparatively late cases. *Va. and Al. Coal Co.* v. *Central Ra. Co.* (1897) 170 U. S. 355; *Southern R. R.* v. *Carnegie Steel Co.* (1900) 176 U. S. 257.

Having fairly started the doctrine on its course, the Supreme Court then took up the harder task of limiting it, commencing with *Kneeland* v. *Am. Loan and Tr. Co.* (1890) 136 U. S. 89. There an intervention for car rental was denied, on the two principal grounds that (1) there were no surplus earnings; (2) as the original bill was filed by a judgment creditor for reorganization, the mortgagee could not be required to do equity. Later it was held that the intervenor must show that he looked to the surplus earnings as the source of his payment, and not the general credit of the railway. *Thomas* v. *Car Co.* (1893) 149 U. S. 95. In *Porter* v. *Steel Co.* (1887) 120 U. S. 649, this doctrine was held not to apply to debts incurred in the construction of the line; and the Court has strongly stated, *obiter*, that it is to be enforced only in railway foreclosures. *Wood* v. *Guarantee Trust Co.* (1888) 128 U. S. 416.

In addition to the limitations upon the doctrine of *Fosdick* v. *Schall*, already outlined, others have become well defined. In *South-*

ern Ry. Co. v. *Chapman Jack Co.* (C. C. A. 4th Circ. 1902) 117 Fed. 424, debts for jack-screws sold to a railroad company over six months previous to the receivership were held not entitled to preference; while the sale of the same kind of articles, made within that period, was held to create a preferred debt. This limit of six months is well settled in the lower courts. *Cent. Trust Co.* v. *East Tenn. R. Co.* (1897) 80 Fed. 624, and has been adopted by the Supreme Court, *Union Trust Co.* v. *Ill. Midland Co., supra.*

Still another recent decision, *Southern Ry. Co.* v. *Ensign Mfg. Co.* (C. C. A. 4th Circ. 1902) 117 Fed. 417, raises the point as to preference of a debt for goods supplied to one line to be used upon another. There the intervenor sold car-wheels to the A railway, with knowledge that the purchaser intended to use them upon the B line, which was under lease to the A company. On foreclosure of a mortgage covering only the A railway, it was held that the claim could not be preferred. The Court well distinguishes *Southern Ry.* v. *Carnegie Steel Co. supra*, where, though the rails in question were used upon a subordinate road, yet the latter was covered by the mortgage under foreclosure. The obverse is presented by *Coal Co.* v. *Central R. R., supra*, where, on a state of facts very like those in the *Ensign Mfg. Co's* case, the foreclosure was of a mortgage upon the leased line, instead of that of its lessee; in which case the debt was given preference.

An important question is, out of which fund are these debts, when allowed, to be paid? If the surplus earnings have, in fact, been "diverted," clearly the *corpus* must meet the debt. If the lower court has itself, after denying the intervention "diverted" the earnings by ordering their application to other things, the appellate court can, on reversal, direct payment out of the *corpus*. *Burnham* v. *Bowen, supra*. If the operation of the road by the receiver has resulted in surplus earnings, payment can be made from them. *Southern Ry.* v. *Carnegie Steel Co.; Coal Co.* v. *Central R. R., supra.* But if there has been no surplus either before or after the receivership, the debt cannot be preferred, and the *corpus* cannot be touched. *St. Louis R. Co.* v. *Cleveland R. Co.* (1888) 125 U. S. 558; *Niles Tool Co.* v. *Ry. Co.* (1902) 112 Fed. 561.

CONSTITUTIONAL LAW—EMINENT DOMAIN—INJURY TO BUSINESS. The Fifth Amendment to the Constitution of the United States and the constitutions of the various States provide that private property shall not be taken for public use without just compensation. A recent Massachusetts case decides that a mere injury to an established business without the actual appropriation of the land on which it is carried on is not a "taking of property" in such a sense as to entitle its owner to compensation therefor. *Sawyer* v. *Commonwealth* (1902) 65 N. E. 52. The Court says on p. 53: "A business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals."

In *Monongahela Nav. Co.* v. *U. S.* (1892) 148 U. S. 312, it was held that this provision extends only to property taken; that what is physically appropriated must be paid for; but that this is as far as the